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Office of Administrative Law Judges
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Issue date: 21Jun2002

Case No: 2001-CER-00001

In the Matter of

RAYMOND L. SCHLAGEL,
Complainant

v.

DOW CORNING CORPORATION,
Respondent

APPEARANCES:

Sharon Sobers, Esq.
For the Complainant

Timothy P. O'Mara, Esquire
Kenneth Handmaker, Esquire
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint of discrimination filed pursuant to the anti-retaliation provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 ("CERCLA"), the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), and the Clean Air Act, 42 U.S.C. §7622 ("CAA"). The implementing regulations are found at 29 C.F.R. Part 24. The statutes afford protection from employment discrimination to employees who commence, testify at, or participate in proceedings or other actions to carry out the purposes of the statutes. The laws are designed to protect "whistle-blower" employees from retaliatory or discriminatory actions by the employer. In environmental whistleblower cases, the complainant has an initial burden of proof to make a prima facie case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and, (3) the evidence is sufficient to raise a reasonable

inference that the protected activity was the likely reason for the adverse action. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996). Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

Complainant, Raymond Schlagel, filed a complaint against Respondent, Dow Corning, alleging discrimination based upon Complainant's engagement in protected activity. A hearing was held in Cincinnati, Ohio from October 2 to October 4, 2001, and from December 5 to December 6, 2001. On October 5, 2001, the hearing was conducted in Carrollton, Kentucky.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations.

References to CX and RX refer to the exhibits of the complainant and respondent employer, respectively. JX refers to joint exhibits, and ALJX refers to administrative law judge exhibits. The transcript of the hearing is cited as "Tr." and by page number. The transcript of the hearing conducted in Carrollton, Kentucky, is cited as "Tr. at Carrollton" and by page number.

I. PROCEDURAL HISTORY

The complainant, Raymond Schlagel, was employed by Dow Corning Corporation, Respondent, from 1989 until his suspension on October 15, 1999 and subsequent termination on November 10, 1999. Mr. Schlagel filed a complaint with the Department of Labor alleging numerous grounds of discrimination. (ALJX 1). His complaint was denied on February 12, 2001, (ALJX 3), and Mr. Schlagel appealed for a formal hearing the same day. (ALJX 4). The claim was then referred to the Office of Administrative Law Judges for a hearing. A formal hearing was held on the record from October 2 through October 5, 2001, and continued until the remainder of the hearing occurred from December 5 through December 6, 2001. Post-hearing briefs and reply briefs were simultaneously submitted to the administrative law judge after the hearing.

II. CREDIBILITY FINDINGS

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence – analyzing and assessing its cumulative impact on the record. *See Frady v. Tennessee Valley Auth.*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing *Dobrowolsky v. Califano,* 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Prod. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971).

Credibility is that quality in a witness which renders his evidence worthy of belief. *See id.* For evidence to be worthy of credit,

> [it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., 442 F.2d at 51. An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3d Cir. 1975)(citing *National Labor Relations Bd. v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds, 340 U.S. 474 (1951)).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses from which impressions were formed as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

The transcript of the hearing in this case is 1,315 pages, comprised of the testimony of thirteen different witnesses.

I found the testimony of Complainant, Raymond Schlagel, to be credible generally; however, there exist several exceptions.

I do not accept Complainant's testimony concerning John Lackner's conduct in handling a hydrogen chloride cloud incident, as Complainant's testimony, at best, is based upon his son's recollections. (RX 9, p. 1). Complainant's version of events on that day receives no support from witnesses who actually observed the event, and Complainant's

report on the event also fails to mention Lackner's running into the cloud. On the issue, I find Complainant's testimony lacks credibility.

In addition, I find Complainant's testimony in regard to his "lower" performance evaluations after his complaints regarding environmental and safety issues to be strained beyond significant credibility. Complainant's testimony ignores very similar remarks on previous evaluations, and I find such an omission diminishes the veracity of Complainant's assertions.

I also find Complainant's testimony regarding the need for a process change request to utilize the bypassed valve questionable. While I find that his testimony does not strain credulity enough to undermine the reasonableness of his concern for environmental safety, I find his lack of knowledge concerning the implementation of process change requests suspicious in the face of the overwhelming evidence that a process change request was not needed to use the bypass on the specific valve in question. Complainant demonstrates a surprising lack of knowledge concerning a fundamental procedural issue for someone of his ability and rank.

While I question the veracity of several of Complainant's versions of events, I am compelled to find that the substantial majority of Complainant's testimony was credible and delivered truthfully.

I also find John Lackner's testimony generally credible. On the stand, Mr. Lackner occasionally came across in a gruff manner, and, at times, he was uncooperative during cross-examination, i.e., demonstrating a resentment to questioning. On the whole, however, I find that Mr. Lackner's testimony was delivered honestly and comported with reason and the existing facts. Mr. Lackner hesitated when asked to prioritize the reasons he gave for Complainant's suspension and termination, and such hesitation gives me pause to reflect upon the possible contrivance of his testimony. Upon further reflection, however, I am convinced that Lackner's answers were sufficient and truthful, although he may have been uncooperative in explaining his complete and ordered rationale for his implementation of the suspension and termination. I surmise that any uncooperativeness demonstrated by Mr. Lackner on the witness stand was borne more from a nervousness concerning how he was perceived than by any effort to contrive his answers by delivering vague responses to specific questions.

I find the testimony of Gordon Venema, Michael Green, Oliver Williamson, and Mark O'Malley to be credible.

Katy Biallas's testimony was, at times, not completely believable. Biallas's description of the events of October 15, 1999, appeared exaggerated on the stand and, when compared with the other descriptions of that day, also appears inflated. The remainder of Biallas's testimony was generally credible; however, as stated, I discount her version of the events of October 15, 1999, as they appear to be exaggerated and lacking credibility.

I find the testimony of Andy Pierce to be generally credible. Pierce served as Complainant's supervisor for a period of time. Though Pierce's stated reasons for moving Complainant off the C3 Compressor project differ from Complainant's allegations, I find that Pierce's testimony was honest, credible and thorough.

I find certain aspects of Ed Ovsenik's testimony to lack credibility. Specifically, Ovsenik's testimony ranged from the highly specific to the vacuously general. At times, Ovsenik's inability to recall specific answers appeared disingenuous when compared to his ability to recall small details. For example, when asked repeatedly to list the people at Dow Corning to whom he spoke when conducting his environmental, safety, and health investigation into Complainant's April 23, 1999 e-mail complaints, Ovsenik listed Mike Nevin, Adam McNeese, "someone" from the safety group, and "someone" from corporate safety. (Tr. 775-76). Ovsenik guessed that Ron Lund may have been the individual he spoke with from corporate safety. Despite Ovsenik's inability to recall *to whom* he spoke within the safety group, he recalled with ease the substance of the conversation. (Tr. 777). Further mystifying this Court is Ovsenik's inability to remember whether he took notes during these conversations. *Id*. While Ovsenik surely encountered many people during his work day and cannot be held responsible to remember the name of every stranger with whom he spoke, I find Ovsenik's assertion that he cannot remember whether he took notes during these conversations to be totally unbelievable.

Ovsenik's notes also figure in other aspects of Ovsenik's implausible testimony. Ovsenik testified that he shredded his notes from his discussions with Complainant after he prepared his draft opinion of his investigation but before a final opinion was ever produced. (Tr. 764). I find such testimony curious on two grounds. First, such attention to detail is in direct contradiction to Ovsenik's earlier testimony that he could not even remember whether he took notes during his conversations with other employees. Obviously his notes played an important part in his report preparation, yet Ovsenik testifies that he cannot remember whether or not he took notes during some of his investigations. I find such testimony strains credulity beyond any credibility. Furthermore, Ovsenik repeatedly testified that he had prepared no formal, final report as to his investigation when Complainant was terminated. (Tr. 778). Yet, Ovsenik would have this Court believe that he shredded his notes after he completed a mere draft. I find that assertion contrary to common sense. I cannot fathom a corporate attorney shredding the notes of his entire investigation after completing a mere draft and before producing a final, formal report. Such action is unreasonable at best, and I find such testimony is not worthy of belief.

I find the testimony of Eric Heimke lacks credibility also. (Tr. 839-904). On the stand, Mr. Heimke's responses to cross-examination were less than cooperative, and, more importantly, Mr. Heimke's answers defy reason and are not believable.

Heimke's testimony focuses for a significant period on the fact that Complainant responded to his progress evaluations in writing on several occasions. Heimke, the human resource manager, found this "unique." (Tr. 843). Heimke asserted that Complainant's attachments to his progress reports were attempts on the part of Complainant to "twist" the facts to contradict his supervisor's evaluations. (Tr. 859). I find this assertion baseless. A review of Complainant's attachments does reveal disagreement with his supervisor's evaluations on some points; however, Complainant's remarks completely lack the nefarious intent that Heimke would attribute to them. Rather, Complainant's remarks reveal what one might expect in such a situation: two individuals disagreeing on subjective assessments. Heimke's repeated testimony that Complainant attempted to "twist" facts belies reason and the evidence. It is not, as Heimke stated, "indicative of someone who...doesn't accept performance coaching and criticism." (Tr. 882).

Heimke's testimony suffers from other, more serious maladies. Heimke states throughout his testimony that Complainant acted as if he were paranoid. (Tr. 859). However, as evidence of such paranoia, Heimke points only to Complainant's additions to his performance evaluations and the unsubstantiated allegation that on "two or three" occasions Complainant looked though his personnel file. (Tr. 859-60). I find such testimony exaggerated and wholly lacking credibility. Despite Heimke's intimation that employee performance reviews did not welcome employee feedback, (Tr. 878), the progress evaluations clearly provided such an opportunity. Furthermore, Heimke testified that he had witnessed other employees check their personnel files "once," but never more than once. (Tr. 885). I find Heimke's implicit delineation between "usual/normal" and "unusual/paranoid" as represented by reviewing one's personnel file "once" or "more than once" completely unpersuasive. Such testimony is completely lacking credibility.

The most glaring example of the lack of credibility in Heimke's testimony occurred when Heimke testified that "a number" of Dow Corning employees expressed concerns about Complainant's mental and emotional stability – whether Complainant would "go off" – yet Heimke, when questioned, could not recall a single employee's name that had expressed that sentiment to him. Further adding to the complete implausibility of Heimke's version of events is the fact that Heimke testified that he recognized these "warning signs" of instability due to his experience with workplace violence, yet Heimke expressed his concern to no one. (Tr. 886). I find it completely unbelievable that a human resources manager, whose sole job is attending to the needs of employees in the workplace, cannot remember the identity of one employee who expressed a serious concern about his or her physical safety in the workplace. I find it even more unfathomable that a human resources manager would have concerns about the mental and emotional stability of an employee and the physical safety of his coworkers and yet fail to mention that concern to anyone at his workplace. Despite the passage of two years from the time of the incident until Heimke's testimony, Heimke's inability to remember the identity of even one employee who made such a statement to him typifies his entire testimony in front of this Court. His testimony defies reason and eludes believability. I find it totally lacking credibility.

I find the testimony of Mike Nevin to be credible.

I find the testimony of Chris Kneale to be credible. Mr. Kneale's testimony probatively addressed several key issues, and he delivered such testimony honestly. I accord less weight, however, to Mr. Kneale's ultimate explanation for the Backstep job offer to Complainant. Mr. Kneale offers a confusing reason for the Backstep job offer when he states that, although he knew Complainant was not interested in the position, the job offer was still extended because Complainant had failed to express interest in any other positions. (Tr. at Carrollton, p. 96-97). I found such an answer perplexing and, more importantly, unreasonable. With the exception of this one detail, however, I find Mr. Kneale's testimony to be credible.

III. ISSUES

1. Whether Complainant engaged in protected activity by making internal complaints concerning valves running on bypass, solids accumulating throughout the process, flow meters malfunctioning, Freon leaks, unsafe work practices such as the operations manager running into a hydrogen chloride cloud, and design flaws leading to chemical releases?

2. Whether Complainant suffered adverse employment actions when Respondent 1) removed him from the compressor project; 2) removed him from the methylchloride area; 3) attempted on three occasions to remove him from Area II in January, June, and August 1998; 4) "unjustly" criticized him in his April 1999 performance appraisal; 5) "demoted" him to a backstep position he did not desire; 6) suspended him in October 1999; and 7) terminated his employment on November 10, 1999?

3. Whether Respondent discriminated against Complainant because of his protected activity?

IV. STATEMENT OF THE CASE

The issue in this case is whether Dow Corning Corporation [hereinafter Dow Corning] discriminated against the complainant because of the complainant's engagement in protected activity.

Complainant contends that his internal complaints regarding various activities at the plant – valves running on bypass, solids accumulating throughout the process, flow meters malfunctioning, freon leaks, unsafe work practices such as the operations manager running into a hydrogen chloride cloud, and design flaws leading to chemical releases – were "protected activity" under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 ("CERCLA"), the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), and the Clean Air Act, 42 U.S.C. §7622 ("CAA").(Complainant's Trial

Brief, p. 16-22). Complainant alleges that the respondent discriminated against him because of his protected activity by 1) removing him from the compressor project; 2) removing him from the methylchloride area; 3) attempting on three occasions to remove him from Area II in January, June, and August 1998; 4) unjustly criticizing him in his April 1999 performance appraisal; 5) "demoting" him to a backstep position he did not desire; 6) suspending him in October 1999; and 7) terminating his employment on November 10, 1999. (Complainant's Trial Brief, pp. 22-23).

It is Dow Corning's position that no protected activity took place, no retaliation occurred, and, furthermore, no nexus between the two can be demonstrated. Dow Corning provides alternative explanations for each of the events that Schlagel credits as discriminatory.

V. FINDINGS OF FACT

Prior to working for Dow Corning, Complainant earned a bachelor's degree in chemical engineering at the University of Michigan and worked as a chemical engineer for over five years at three other companies. (Tr. 41-42; CX 164). He began his employment with Respondent in May 1989 and worked until his termination in November 1999 – a span of time over ten years in length. (Tr. 42).

Dow Corning Corporation is headquartered in Michigan and operates a number of chemical plants in the United States and abroad. In its Carrollton, Kentucky plant, the subject of the instant case, Dow Corning produces silicones that are ultimately used in various products, such as deodorant, shampoo, caulk, and lubricants. (Tr. 33). The process to produce silicones is complicated and potentially dangerous. Two byproducts of the production are methylchloride and hydrogen chloride gas. Due to the dangerous properties of these chemicals, their handling is statutorily regulated and certain transactions with the chemicals must be reported to various agencies. (CX 77).

From 1989 until 1996, Complainant worked in the plant engineering group. After he started his employment, until May 1992, Complainant worked in the waste treatment area as a plant engineer. From May 1992 until March 1993, the complainant worked as a project engineer, which forced the complainant to work at different sites around the plant on various projects. From March 1993 to mid-1995, Complainant worked in Area 5 on the methylchloride process and the thermal oxidizer. From mid-1995 until the end of the calender year, Respondent assigned the complainant to a special project, entitled Eagle, to ensure the running of the pilot plant. (Tr. 166-69). Respondent does not dispute that Complainant performed well in his various jobs through 1996. (Respondent's Post-Hearing Brief, p. 4; JX 6, p. 68). In 1996, Complainant moved to the manufacturing group in Area II of the plant. Complainant accepted the position as a project engineer, and the operations manager of the plant, then John Lackner, assigned the complainant to Section D1 (methylchloride process) and Sections C2 and C3 (hydrolysis process). (Tr. 38). Complainant held his position as a

project engineer until his termination. The complainant's supervisor was Andy Pierce, (Tr. 42), until January 1998 when Chris Kneale became his supervisor. (Tr. 43). Both Mr. Kneale and Mr. Pierce reported to John Lackner. *Id.*

Complainant's first annual review while working in his new position as project engineer was excellent. (JX 5, p. 50-66). His supervisor, Mr. Pierce, stated, "Ray's efforts to lead Area 2 capital project management in 1996 was [sic] excellent. He clearly has the capability to ensure needed projects are defined, scoped out, resourced, and implemented." (JX 5, p. 58). He continued, "Ray truly knows how to 'jump out of the box' to look for novel ways to resolve problems. He works aggressively with vendors/suppliers/consultants to ensure we bring new thinking into Dow Corning to improve our technology base." *Id.* The review is replete with positive comments on Complainant's work performance; however, his supervisor also added, "This is clearly Ray's best opportunity to develop leadership qualities - being able to facilitate the work of others so that he can steer away from being detail oriented and help guide the overall effort more..." (JX 5, p. 63). His supervisor's focus on the need for Complainant to develop his leadership skills is clear, as he states, "Development on enhanced leadership capabilities should be Ray's goal for 1997. He is in a position to do this (with NEXT STEP) and to be visible at the same time...something he will need so that site management can 'recognize' his contribution." (JX 5, p. 65).

Complainant's 1997 review was similar to his 1996 review. (JX 4, p. 35-49). In a periodic progress report,[1] dated April 30, 1997, Complainant's supervisor, Andy Pierce, noted, "Ray has no problems with applying his technical prowess in his job – the need to 'sell' ideas is very critical to future success." (JX 4, p. 37). Six months later, Complainant's supervisor again noted Complainant's struggling leadership qualities in an October 16, 1997 periodic review, stating, "Ray's biggest struggle now is expanding his influence among influential people with whom he works. He recognizes this, and [we] will be working together to ensure Ray can push forward his suggestions ...." (JX 4, p. 38).

On his year-end review, completed on February 26, 1998, Complainant's supervisor wrote, "Conflicts in the past need to stay in the past as far as decision-making goes." (JX 4, p. 42). Complainant testified that these "conflicts" occurred when he brought up safety and environmental issues. (Tr. 52-53). Respondent disagrees that such "conflicts" represented safety and environmental issues, pointing to Complainant's statement on his 1997 performance evaluation that states, "My questioning of sketchy details lead to conflicts." (JX 4, p. 42). Furthermore, Andy Pierce testified that his statement that Complainant's "conflicts" need to stay in the past referred to Complainant's current day encounters with people with whom Complainant did not get along. (Tr. 605). Pierce testified that Complainant had expressed

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[1] Dow Corning's internal policies dictated that employees received periodic (quarterly) progress reports from their supervisors. In addition, employees received a more thorough, end-of-the-year review that contained the employee's periodic reviews for the year in addition to a separate assessment of the employee's performance during the entire calender year.

reservations about working with individuals with whom he had previously had tense working relationships. (Tr. 605-06). Pierce worried that this attitude would inhibit the progress of the projects. *Id.*

Complainant first raised a safety concern after a July 27, 1997 release of methyl-chloride into the atmosphere. (Tr. 53). Complainant learned of the release after he received an e-mail from Mike McGee on August 5, 1997. (Tr. 54; CX 72). Mr. McGee's e-mail attributed the release to two factors: 1) an accumulation of solids throughout the process machinery and 2) open bypass valves, necessitated by the accumulation of solids. (CX 72, p. 119). When Complainant received this e-mail, he spoke with Andy Pierce and inquired how the company would solve the problems of the solids build-up, stating that it needed to be corrected. (Tr. 55, 58). Complainant testified that Pierce denied that the valves were on bypass. Complainant asserted that everyone knew they were operating valves on bypass and simply waiting for a shutdown to tackle the problem. (Tr. 58).

Complainant was concerned about the valve bypass because he believed OSHA required a process change request [PCR] whenever any process went on bypass, even if the bypass was merely to facilitate maintenance. *Id.* Complainant knew that Dow Corning had not obtained a PCR. (Tr. 59). Chris Lanthier testified that, while a PCR was required to put in a bypass valve, a PCR was not needed to operate the bypass. (Tr. at Carrollton, p. 183). John Lackner affirmed that a PCR would be required when a bypass valve was installed; however, a PCR would not be required for a change in process, i.e., the bypass valve was activated. (Tr. 1055, 1060-61).

Andy Pierce recalled two discussions with Complainant concerning the solids issue, both of which covered essentially the same concerns. (Tr. 583-84). He recalled that Complainant's concern around the use of the bypass valves hinged on safety concerns. *Id.* Pierce inquired as to whether the bypasses were around ESD [emergency shutdown] valves. *Id.* When Complainant informed him that they were not, Pierce felt that there was no environmental concern, but he did not prevent Complainant from addressing Complainant's concerns again. (Tr. 584). Pierce also admitted to Complainant in their conversations that it would be better to run the plant without having to use bypass valves. *Id.* Pierce hoped that Complainant would help the plant reach that level of efficiency. *Id.* Mark O'Malley, a manufacturing engineer in Area II, testified that Complainant never spoke to him about the solids build up issue, despite the fact that he supervised the bypassed valves. (Tr. 647).

Complainant subsequently undertook to research the solids build-up issue. (Tr. 60-62). He spoke with people in engineering and received some technical reports from the corporate headquarters office. (Tr. 62). Ultimately, Complainant concluded that the solids problem emanated from excessive temperatures in the hydrolysis process. *Id.* Complainant reported his findings in an October 10, 1997 e-mail to Andy Pierce, Chris Lanthier, and John Lackner. (Tr. 63-64; CX 73, p. 121-22). Complainant testified that his proposal to solve the

solids issue received no support, and, eventually, he was removed from looking into the siloxane carry-over issue. (Tr. 64-65).

At the time Mr. Schlagel was investigating the siloxane carry-over issue, he was also involved in a compressor project, the C3 Motors Project mentioned above. (Tr. 65-66). In a November 6, 1997 e-mail, Complainant again raised his concerns with Andy Pierce. (CX 75, p. 125-26). The e-mail primarily discusses Complainant's objection to the project on fiscal grounds; however, a small portion of the e-mail addresses safety issues.

> Don't get me wrong I am for safety but I think we need to evaluate the alternatives and the cost. Please don't take this next statement wrong. We in D1 have run for some time with control valves on bypass due to the solids issue. This is also a safety issues [sic] of which the operators agree is an [sic] big items. What would happen if a shutdown occurred and we are on bypass? This seems to be a rate/safety issue.

(CX 75, p. 125).

After Complainant e-mailed his concerns over the C3 Motors Project on November 6, 1997, (CX 75), he was shortly thereafter removed from the project. (CX 107, p. 194-95). Complainant had written a technical manual used on site for compressors, (Tr. 66-69; CX 114), and his technical proficiency with compressors was recognized by others in the plant. (Tr. 71, CX 8). Complainant believed his removal from the compressor project was a byproduct of his acknowledgment of the bypass and solids issues. (Tr. 76).

The C3 Project was headed by Chris Lanthier as an outgrowth of Nextstep. (Tr. at Carrollton, p. 136-37). Lanthier testified that he did not remove Complainant for raising environmental concerns. (Tr. at Carrollton, p. 136). Indeed, Lanthier testified that, at the time of Complainant's removal from the C3 Project, Complainant had never raised safety or environmental concerns with him. *Id.* Lanthier testified that he removed Complainant from the project because Complainant "continuously did not meet the time tables" and failed to define the scope of the project. (Tr. at Carrollton, p. 135, 162). The scope of the project, however, was not solely in the hands of the Complainant. The record contains communications from Complainant to Chris Lanthier complaining of project changes occurring unbeknownst to Complainant. (CX 101, p. 180). Complainant's feelings of being left out of the loop, *id.*, were compounded when Complainant was subsequently omitted from a group e-mail related to compressors, despite the fact that he was supposedly in charge of compressor projects. (CX 109, p. 198).

John Lackner had also spoken with Lanthier, Nevin, and Pierce about taking Complainant off the C3 Project. (Tr. 1018). Lackner was concerned about Complainant's leadership of the project after reviewing his performance in a former project, citing the C2 Project and its "gross[] overrun."(Tr. 1018-19) Instead, Lackner testified that the decision

was to give leadership to a "hit team" that was young and had enthusiasm for the project. (Tr. 1018).

Complainant next spoke of his environmental and safety concerns, including freon releases, valve bypasses, equipment issues, and compressor problems, with John Lackner during a December 1997 meeting. (Tr. 72-73). Complainant told Mr. Lackner that the incidents occurring in the plant were not accidental; however, Complainant testified that Lackner's response was to not change the status quo. (Tr. 73-74).

Eventually, Complainant was offered a job in the reliability group. (CX 184, p. 495). The complainant, however, turned the job down, as evidenced by his January 14, 1998 response to inquiries from Andy Pierce. *Id.* He testified, "[T]he purpose of the job move was to get me out of the process area." (Tr. 75).

In early 1998, there was a hydrogen chloride release at the plant. (Tr. 76). Complainant testified that Lackner had run into a hydrogen chloride cloud to shut off the compressor and stop the release, but Complainant did not witness the event. Rather, Complainant led the team investigating the release. (Tr. 76-77). Concerning the investigation, the complainant raised two issues: 1) the failure of tantalum pipes and 2) the need to follow correct Dow Corning procedures when handling a release and compressor shut off. (Tr. 77-78, 122). Eventually, the investigative team issued a report concerning the hydrogen chloride release, but neither of the safety issues Complainant raised concerning the release were included in the report. (Tr. 79). Complainant testified that he was instructed to leave those issues out of the report. *Id.* Lackner, however, testified that he never ran into a hydrogen chloride cloud, (Tr. 1021-23), and Nevin also testified that Lackner had not run into the cloud. (Tr. 929, 1002-03). Beyond Complainant's version of the events, which appears to have been partially gathered from information from Complainant's son, (RX 9, p. 1), no evidence in the record supports Complainant's version of the events of the hydrogen chloride release.

Complainant had another meeting with Lackner on June 26, 1998. (CX 22, p. 62). In the meeting, the parties discussed a job move for the complainant. Schlagel, however, voiced to Lackner that he felt he was being forced out of the area. (Tr. 79). Complainant again raised the issues of valve bypass and freon emissions. (Tr. 80). Complainant believed that he was being forced out specifically because he raised safety and environmental issues. *Id.*

Around the time of his meeting with Lackner, Complainant was also handling problems originating from an under-reading flow meter. (Tr. 80-81). The flow meter measured the excess waste gases (methanol and methylchloride) released from the methylchloride process into the atmosphere. *Id.* Complainant learned that the flow meter was under-reading the amount of waste traveling through the vent in April or May 1996. (Tr. 81). Nothing was done to correct the flow meter until Complainant wrote a PCR to change the meter in June 1998. (CX 82, p. 147). The Complainant's PCR clearly indicated that the current flow meter produced readings which violated regulatory standards. (Tr. 82; CX 82, p.

147). Once the new flow meter was installed, the complainant's suspicions were confirmed – the vents were read as considerably higher than previously reported by the malfunctioning flow meter. (Tr. 86). A report from manufacturing engineer Mark O'Malley corroborated Complainant's conclusions. (CX 84, p. 149; Tr. 86-87).

Mike Nevin testified, however, that the problem was originally brought to his attention by Air Engineer Adam McNeese. (Tr. 934). Nevin testified that once the problem was identified, a new meter was special-ordered and replaced. Ultimately, Nevin testified, the old meter was not significantly off, and no violation of statutory or regulatory provisions occurred as even the higher readings were within regulatory limits. (Tr. 935-36).

During the summer of 1998, another project engineer, Katy Biallas,[2] was hired to work in Area II. (CX 24, p. 64). Mrs. Biallas began her employment in September 1998. (Tr. 88). On August 25, 1998, Complainant requested a meeting with his supervisor, Chris Kneale, to review the new division of responsibility with the pending addition of Mrs. Biallas to the area. (Tr. 88). The meeting, however, never occurred. *Id.*

Shortly after his e-mail to Kneale to clarify the division of responsibility in Area II, Complainant had a meeting with John Lackner. (Tr. 88-89; CX 26, p. 66). During the meeting, which Complainant described as unpleasant, Mr. Lackner requested that Complainant take another job, moving to the reliability group to lead certain projects. (Tr. 89, 246). Again, Complainant raised the various safety/environmental issues he had been working on – compressors, strainers, freon emissions, valve bypasses, etc. *Id.* Lackner was unresponsive, citing that he had the "overriding vote" to move Complainant, regardless of Schlagel's wishes. (Tr. 89-90). Complainant told him that he felt like he was being forced out. (Tr. 90; CX 26, p. 66).

The following Monday, August 31, 1998, which Lackner had assigned as the deadline for Complainant to accept the new position in the reliability group, Complainant met with Mike Nevin, who would potentially be the complainant's supervisor in the reliability group. (CX 29, p. 69). Again, Complainant raised issues with the compressor and the 3000 column projects. (Tr. 90). Complainant thought his job was being threatened as Nevin told him that he could not guarantee that Complainant would have a job if he did not accept the reliability job.(Tr. 90; CX 29, p. 69). Nevin denies threatening Complainant's future with the company. (Tr. 924). Indeed, Nevin testified that he lacked the authority to make such a statement. *Id.* Nothing in the record indicates that Nevin possessed such authority. The evidence concerning whether a statement such as this was made consists solely of Complainant's word against Nevin's word. I have previously found both gentlemen to be generally credible, and I find neither man's version of events more compelling than the other. As Complainant bears the

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[2] After beginning her employment with Dow Corning, Mrs. Biallas married. Mrs. Biallas's maiden name was Heng. Hereinafter, references to Katy Heng in the evidentiary record or parties' briefs will be interpreted as references to Katy Biallas.

burden to demonstrate facts by a preponderance of the evidence, I must find that no such threat occurred. I find it highly probable that comments concerning job security were made, but simply interpreted by both parties differently.

Mike Green had previously approached Complainant three times about a position in the reliability group. (Tr. 553). When he was unable to get a final answer from Complainant, Green asked Mike Nevin to help him pull Complainant into the reliability group. (Tr. 552). Green wanted Complainant in his group because he felt that Complainant was a "good performer," and that Complainant was "[h]ighly regarded by his peers." (Tr. 553). Green testified, "[Complainant] had fit in well before and performed well, and that was what was expected." *Id.* Lackner knew of Green's interest in Complainant and supported the move. (Tr. 1014-15). Lackner viewed the transfer as a lateral move. (Tr. 1015). Nevin's rationale for moving Complainant to the reliability group centered around the need in the area, the relative youth of the other members of the area, Complainant's previously positive performance in the engineering group, and the good reputation Complainant enjoyed in the area. (Tr. 922).

Before Complainant's meeting with Nevin, Complainant had submitted an e-mail to Chris Kneale and others in Area II addressing the need to replace freon in the refrigeration units, despite the fact that the amount would be large enough to count as a "freon release" and, thus, to qualify as a release required to be reported. (Tr. 91; CX 118, p. 249). Complainant's preoccupation with freon leaks is not corroborated by other witnesses. Complainant acknowledged the on-site plan to reduce freon emission in his e-mail to Kelly, Dodd, and Ovsenik. (RX 9, p. 2). Complainant maintained that a release had to be reported to the state, however. *Id.* Complainant's real issue with freon seems to be efficiency, so as to keep leaks to a minimum. (Tr. 233-34).

Following his meeting with Nevin, Complainant sent an e-mail to Lackner stating,

> I still feel the same about the issues/concerns as mentioned to you. After thinking about it more over the weekend and thinking about the items you mentioned I think it best to leave the decision up to you. In whatever capacity at Dow Corning I will still work in a safe and environmental conscience [sic] manner.

(CX 27, p. 67).

Complainant, however, did not move into the reliability group. (Tr. 93). Complainant was told by Mike Green that Mike Nevin no longer wanted him in the reliability group. *Id.* Nevin testified that his decision to withdraw the job offer from Complainant was based upon Complainant's behavior during their discussion of the job. (Tr. 924-26). Nevin could not get Complainant to speak. After Nevin told Complainant that he would never completely finish his current projects in his current position because he would be forced to continually add new

projects to his job, (Tr. 924-25), "he [Complainant] just stopped talking, stopped looking at me, looked away, looked down, was unresponsive and I asked him if something was wrong." (Tr. 925). Nevin described the encounter as "the most unusual event that I had ever incurred in trying to discuss an offer to somebody that he would act in that fashion." *Id.*

Later that day, Complainant e-mailed his supervisor, Chris Kneale, and informed him that he was taking vacation soon. (CX 28, p. 68). Complainant's rationale for taking vacation time was what he considered hostile meetings with Mr. Lackner and a general effort to move him out of Area II. (Tr. 94-95).

The day after his meeting with Nevin about his accession to the eventually unfulfilled position transfer, Complainant met with Chris Kneale. (Tr. 95; CX 30, p. 70). Kneale informed Complainant that he could take either job, and stated that the last several days must have been hard on the complainant. *Id.* Complainant felt that Kneale was mocking the situation. *Id.* During the meeting, Complainant received a $200 gift check for his efforts during the previous shutdown. *Id.*

On September 29, 1998, Complainant sent an e-mail to management and various other employees in preparation for the upcoming visit by FES (manufacturer of the refrigeration units which had experienced freon leaks in the past - - Schlagel testimony (Tr. 87, 1097)). (CX 122, p. 260-61; Tr. 96-99). The e-mail detailed a myriad of tasks for completion before FES arrived. (Tr. 97). Numerous repairs, in addition to replacing and replenishing the freon in the refrigeration units were needed before the FES inspection. (Tr. 98).

On January 7, 1999, Complainant received a letter from John Lackner, requesting Complainant to review the performance of his team leader, Chris Kneale. (CX 32, p. 73). In Complainant's review, he referenced his safety and environmental discussions with Lackner on a previous occasion; (CX 32, p. 72; Tr. 100), however, he did not detail his safety and environmental concerns with specificity.

In January 1999, the "Area II Spills Analysis and Spill Reduction Recommendations" report was released. (CX 137, p. 292-332). Because Complainant was the project engineer for the hydrolysis process,[3] he led and facilitated the spill team report for Area II. (Tr. 101). The primary conclusion in the spill team report is the need for management support. (CX 137, p. 317; Tr. 101). Complainant explained that management support would provide the needed time, financial resources, shutdowns, and an overall plan with a clearly defined mission statement. (Tr. 101). For his "leadership of the hydrolysis spills reduction team," Complainant received a cash award. (JX 3, p. 28-29; Tr. 101-02).

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[3] By this time, Katy Biallas had taken over the methylchloride process in Area II. Thus, Complainant was left to direct the hydrolysis process.

On February 25, 1999, Complainant sent an e-mail to Chris Kneale and others, including John Lackner, concerning the performance of heat exchangers. (CX 153, p. 395-96). The exchangers were running beyond their specified temperature limitations, and the process was eventually modified to reduce the temperatures in the heat exchangers. (Tr. 102). Kneale responded to Complainant in an April 28, 1999 e-mail, giving Complainant full authority to investigate issues with the heat exchangers. (RX10, p. 2).

In April 1999, Complainant attended an influence management course in Midland, Michigan, at the behest of Dow Corning. *Id.* Also attending the conference was Dow Corning attorney Nathan Franklin. (Tr. 103). Prior to attending the conference, Complainant's peers were requested to complete surveys concerning the complainant and his leadership and influence qualities. (CX 144, p. 342-361). The results surprised Complainant, as they reflected very strong leadership and influence in his opinion. (Tr. 102-03). During the course, an opportunity to raise questions was offered to bring out real life issues in the workplace. (Tr. 103). Complainant brought up his safety concerns, and asked how one handles safety and environmental concerns when their supervisors are not responsive. (Tr. 104). The course instructor informed Complainant that he had two options: 1) quit, or 2) go to the next level of management. *Id.* Mr. Franklin, hearing Complainant's concerns, informed him to contact Jean Dodd, Ed Ovsenik, and Burnett Kelly. (Tr. 105).

Complaint eventually contacted the trio recommended by Mr. Franklin, motivated by his total performance evaluation for 1998, provided in April 1999. (Tr. 105; JX 3, p. 26). On his overall positive performance review, under "Facilitative Skills," Complainant's supervisor, Chris Kneale, wrote

> Accepted leadership of the areas, hydrolysis spill reduction team. Did an acceptable job but was poor at presentation and leadership. A lot of effort needs to be put in to improving those skills, particularly influence/negotiation, multi-functional scheduling [and] coordination, ability to take charge whether assigned or not – these skills are essential for continued advancement at [Dow Corning].

(JX 3, p. 26). Complainant strongly disagreed with the assessment. (Tr. 106). First, Complainant cited to his recent cash award for leadership of the spill team. (JX 3, p. 28-29; Tr. 101-02). Secondly, the complainant pointed out that the spill team report occurred in 1999, and his evaluation only covered 1998. (Tr. 106). Further motivating his complaints was the fact that he was discouraged from writing remarks disputing the evaluation, as Complainant testified that Kneale informed him it would be "unprofitable." (JX 3, p. 29). Kneale acknowledged such a statement, but explained that he meant he wanted more than words, he wanted a mutual dialogue about Ray's concerns. (Tr. at Carrollton, p. 59-60). Kneale thought that only writing remarks was a waste of time unless it generated communication between the supervisor and the employee. *Id.* Complainant spoke to Kneale about the review, telling his supervisor that he believed the remarks were made in retaliation. (Tr. 108).

With the knowledge of the unfavorable review, Complainant contacted Dodds, Ovsenik, and Burnett to discuss his complaints concerning safety and environmental issues. *Id.* On April 23, 1999, Complainant sent his note, focusing on his concerns regarding 1) bypassed valves, 2) operation managers running into hydrogen chloride clouds, 3) heat exchangers running on overload, 4) freon leaks, 5) tantalum pipe failures, and 6) damaging, unfounded performance evaluations. (CX 44, p. 85-86; Tr. 109). Burnett Kelly never contacted Complainant regarding his e-mail, other than to say that he received it. (Tr. 109; CX 44, p. 85). Complainant was contacted, however, by Ed Ovsenik to set up a meeting to discuss his concerns. (Tr. 110).

Prior to his meeting with Complainant, Ovsenik met and discussed the e-mail with Jeanne Dodd, his supervisor. (Tr. 736-37). They determined that Ovsenik would investigate the environmental health and safety aspects of the e-mail. After he determined the exact complaints in the e-mail relating to environmental health and safety, Ovsenik spoke to Mike Nevin at the Carrollton plant. (Tr. 737; RX 28, p. 1-6). Ovsenik also spoke with Chris Kneale, Complainant's supervisor at that time. (Tr. 741).

Complainant and Ovsenik met in June 1999. *Id.* Complainant recalled the meeting, which was ninety minutes in length, as very general. *Id.* Complainant described most of the meeting as "chit chat," but he did testify that Ovsenik agreed to look into the issues and get back to Complainant. (Tr. 110-11). Conversely, Ovsenik testified that he and Complainant reviewed every point in the Complainant's e-mail. (Tr. 744). Complainant said that Ovsenik did not want to know details, and told Complainant that he "dropped a bomb" with his e-mail. (Tr. 111; CX 49, p. 92). Ovsenik reported that Complainant admitted that most of the issues he brought up in his e-mail were "old" and had already been dealt with. (Tr. 744-45). Ovsenik asked Complainant for documentation of his claims and requested names of other people to whom Complainant believed he should speak. (Tr. 745-46). Ovsenik claims that Complainant provided no such information, but Complainant alleges that no such request was made. Before the end of the meeting, Ovsenik provided Complainant with his contact information, and welcomed further dialogue if needed. (Tr. 746).

After Ovsenik's meeting with Complainant, Ovsenik briefly spoke with John Lackner and inquired into the hydrogen cloud incident. (Tr. 743).

Other than the meeting with Ovsenik, Complainant claims he was contacted by no one else about his e-mail. (Tr. 112). Ovsenik testified that he attempted to phone Complainant, leaving several messages, but never heard from Complainant again. (Tr. 747). Ovsenik told Complainant that someone would get back to him to respond to the concerns raised in Complainant's e-mail; however, Ovsenik admitted on the stand that he was unaware if anyone ever formally contacted Complainant about company's findings from their investigation into the complaints. (Tr. 766, 768).

Complainant did hear the results of the investigation, however. During a periodic progress interview with Chris Kneale on July 7, Kneale told Complainant that his concerns were baseless. *Id.* Claimant responded with written remarks on the progress report; however, none of the remarks were expressions of definite and specific safety or environmental concerns. Complainant admitted that his remarks were directed at the lack of completion of projects. (Tr. 114).

In September 1999, Complainant was offered a position as Backstep coordinator. "Backstep" referred to Dow Corning's program of mothballing machinery as production rates at the Dow Corning Carrollton plant were decreased due to an increase in production at a Dow Corning plant in Wales. (Tr. 1034-35, 123). After creating the position, eight candidates were considered for the position. (Tr. at Carrollton, p. 143-44). The candidates possessed various levels of credentials – within the pool of candidates were one level five engineer, three level four engineers, and two level two engineers. (Tr. at Carrollton, p. 144). Ultimately, the decision was made to offer the job to Complainant, as he possessed the necessary skills and background for the job, and, in addition, he was available because his position would be eliminated by the Backstep program. (Tr. at Carrollton, p. 144-45).

In a September 15, 1999 e-mail, Chris Kneale asked Complainant for an answer on the job offer by October 1. (CX 57, p. 104). Kneale stated that Complainant was the first choice for the position. *Id.* Complainant met with Chris Kneale to discuss the position of September 17, 1999, and Complainant was provided with a sheet outlining the position. (Tr. 124; CX 58, p. 105). Kneale informed Schlagel that the position would be part-time until June 2000, and that the position would be in charge of a budget between $200,000 and $300,000. *Id.* The sheet detailed that the position would likely last from January 2000 to January 2001. (CX 58, p. 105). Responsibilities of the job included: 1) development of shutdown and mothballing strategies consistent with Backstep goals; 2) actual shutdown/ mothballing of the required processes; 3) coordination with relevant area personnel the actual shutdown/mothballing of the required processes; 4) estimation of the resource[s] required for the shutdown/mothballing; 5) management of the above resources; 6) management of the mothballing process – cleanout of the processes, identification and removal of equipment for storage or use as spares, etc.; and 7) development of rough re-start philosophy for when Backstep ends. *Id.* The listed requirements for the job were six years experience as either a maintenance, project, or manufacturing engineer, and a degree in chemical or mechanical engineering. *Id.* The report does not detail definitively who the position reports to. Rather, the description states that the position reports to "area II team leader???" *Id.*

When Complainant had not responded by October 1, 1999, Kneale asked Complainant if he had any further questions about the job. (RX 22). Kneale noted:

> Ray says he still has some questions he needs answering, but appears to me to have put no thought in to considering the decision at all. I asked him to list out his questions [as soon as possible] and that we would get together to

> discuss. He seems to think this is some sort of trap as he keeps saying that there are too many unanswered questions, and he can't commit to the job until he knows how much will be involved, etc, etc. The purpose of the role is to determine all these things. He has a goal of what needs to be achieved, his job is to work out how to get there.

Id. In a previous e-mail to Chris Lanthier, Kneale had expressed similar questions from Complainant. (RX 21). Kneale had prepared a rough draft of the position description for Complainant. *Id.* Like Kneale after October 1, 1999, Lanthier was also surprised by Complainant's seeming lack of knowledge about the position. Lanthier testified that he was surprised by Complainant's statements to Kneale that he "had no idea what the job is" because

> A: ...Ray was in the meeting when we described what the job was going to be. He should have known full well what it was. I was surprised that he would even ask such a question.
> ....
>
> Q: In your opinion, was there enough information [in Kneale's rough draft] to know what the job was going to involve?
> A: Yes. The description is very close, if you compare it to those meeting minutes, it's very close.

(Tr. at Carrollton, p. 146-47).

Complainant did not consider taking the position. (Tr. 124). He felt as though he was being pushed, the company was failing to offer him a viable position, and the job was only part time, leaving him with concerns as to how he filled his time. (Tr. 125). Complainant also felt the job was below what his experience and talent dictated, citing the comparatively small amount of money the position handled in contrast to his current position. *Id.* Complainant also cited a lack of details about the job. *Id.* John Lackner, however, offered a different reason why Complainant was moved. Lackner stated:

> Mr. Schlagel had been in the area (Area II) about three years. We usually figure two to three years is a routine time that an engineer would be in a process. It gives them enough time to learn the area, define the projects, and become proficient and move on to another area. Katy had just started there about six months [earlier]. She had moved into the area to learn that section of the plant, because she had experience in other parts of the plant. It was time to get her three years in.
> ....
>
> Mr. Schlagel was the best match for the Backstep project, based on his previous reliability experience, his knowledge of physical equipment, and the

> need to successfully mothball tens of millions of dollars worth of capital equipment.

(Tr. 533-34, 538). Lackner went as far as to describe the Backstep position as one of global visibility. (Tr. 1037).

Complainant turned the job down, and the position was eventually filled by Michael Long. (Tr. 125-26). Long had less experience, fewer "Hay points" indicating value in the company, and a substantially lower salary than Complainant. (Tr. 126-28; CX 191-93).

During the time he was offered the Backstep position, Complainant continued to experience what he believed to be retaliation for raising safety and environmental concerns. He was assigned what he considered menial work, such as making Gant charts to specify how he allocated his work time. (Tr. 130).

Despite the fact that he turned down the position, Complainant was forced to move to the position anyway. (Tr. 131). Ultimately, Lackner made the decision to move Complainant during a meeting with Chris Kneale, Chris Lanthier, and Mike Nevin. (Tr. at Carrollton, p. 50-51; Tr. 1039). On October 15, 1999, Chris Kneale informed Complainant that he no longer worked in Area II, his new manager was Chris Lanthier, and he was to report to Lanthier immediately. (Tr. 131). Kneale took Complainant to meet with Lanthier, and Complainant and Lanthier discussed the details of the Backstep position. (Tr. 131-32). Complainant testified that Lanthier attributed the move of jobs to Schlagel's evaluations. (Tr. 132). Lanthier informed Complainant that he would now have two meetings per week with him to review his performance -- one on Monday and one on Friday. Complainant described the meetings as very antagonistic. *Id.* Complainant stated, "I got the strong desire that they wanted me to quit right at the moment, right at that time. I can still remember it like it was the other day." (Tr. 133). Complainant informed Lanthier that he was going to take the rest of the day as vacation and start on Monday morning. *Id.*

When Complainant returned to his office, he sent the note that he had previously sent to Dodd, Kelly, and Ovsenik to Gary Anderson, the CEO of Dow Corning. (Tr. 134; JX 13, p. 103). Complainant wrote Mr. Anderson that he felt like he had been bullied into another job. *Id.* After sending the e-mail to Mr. Anderson, Complainant then copied the e-mail and sent a copy to every person at the Carrollton plant. (JX 13, p. 106-09). Complainant knew that outside contractors would receive the e-mail. (Tr. 332). Complainant's e-mail to the entire plant stated:

> I wish I wouldn't have to do this but I feel as such that I have to. As of today I have been moved with my objections (involuntary) to work for the Nextstep/ Backstep coordinator. Please review and may I ask would you have any misgivings working for Chris Lanthier? I am told that my performance has gone down but yet no one has answered my letter or my previous concerns of

> years before this note only that the bullying increases. Am I in error? If rumors start I hope this clarifies things a bit (although there is much more).
>
> Yes, I might get myself fired but may I state I am a Man of Principle and I serve a MIGHTY ONE!
>
> Thanks.

(JX 13, p. 106-09)(emphasis deleted). Complainant sent the e-mail because he felt like "a bear backed into a corner." (Tr. 135). After he sent the e-mail, he went home. *Id.*

Later the same day, John Lackner left a message on Complainant's home answering machine, informing him that he was suspended with pay until the second week of November. (Tr. 136). Complainant did not know why he was suspended. *Id.* Complainant received a letter, written on October 15, 1999, from John Lackner, reiterating his previous phone message. (JX 13, p. 102). Lackner testified that he wanted a cooling down period for all parties involved. (Tr. 486). When Complainant received the letter, he sent a letter to Rik Heimke, the human resources representative at the Carrollton plant, inquiring as to the reason for his suspension. (JX 13, p. 101). Shortly thereafter, Complainant left town, traveling to Minnesota to accompany his wife on a visit with her ill grandmother. (Tr. 137). When he returned later in October, Complainant had messages on his answering machine from Heimke, urging Schlagel to call him. He also had received certified letters from Heimke. (JX 13, p. 99-100). Neither of the letters provided a reason for the suspension. *Id.*

On October 31, 1999, Complainant again wrote a letter to Heimke. (JX 13, p. 98). In the letter, Complainant explained that he had been out of town and had not received Heimke's calls or letter. Complainant stated, "I am looking forward to receiving any written documentation that would warrant any suspension on October 15, 1999." *Id.*

Mr. Heimke responded to Schlagel in a November 3, 1999 letter. (JX 13, p. 97). Addressing Complainant's request for an explanation of his suspension, Heimke wrote:

> [T]he suspension was invoked as a direct result of your actions on Friday, October 15, 1999. The act of sending an "All-Carrollton" note concerning issues previously brought forward by you in your response to your 1998 performance evaluation was viewed as inappropriate, and a misrepresentation of numerous facts. It was felt that your behavior was, at a minimum, an effort to sabotage employee morale at the Carrollton Site. Further, we were at the time, and continue to be, concerned for the safety and security of all employees.

> Your suspension was also enacted to allow Dow Corning an opportunity to review your overall work history and past performance.

Id. Heimke ended his letter with another meeting request for November 10, 1999. *Id.*

Lackner affirmed that insubordination, breach of confidentiality, and plant disruption motivated the suspension. (Tr. 486). Lackner, Nevin, and Heimke all credibly testified to the disruptions caused by Complainant's e-mail. Mike O'Malley, another Area II engineer, also verified the disruption caused in the plant by Complainant's e-mail. (Tr. 651). Lackner estimated that the plant lost six hours of production. (Tr. 487-88). While I find that the disruption was not as great as Ms. Biallas described it, the record reveals that the e-mail did cause a break in work production, as employees stopped to discuss what was obviously an intriguing e-mail.

Complainant responded to Heimke's second letter with a letter dated November 5, 1999. (JX 13, p. 96). He informed Heimke that he strongly disagreed with Heimke's conclusions as to the motivations for his actions. He also felt that Heimke's letter was not specific as to the reasons why the suspension was enacted. *Id.* Complainant agreed to the meeting on November 10, but insisted that security be there. *Id.*

A meeting between the parties occurred on November 10, 1999. (Tr. 138). No discussion of the suspension occurred. Complainant's personal items from his office were waiting in a box for him, and he was terminated. *Id.* Complainant received a letter confirming his termination three days later. (JX 13, p. 88; Tr. 138-39). Lackner reached the decision to fire Complainant by consulting with Heimke, Ms. Carolyn Kimbrough-Davis (a Dow Corning attorney), and Nevin. (Tr. 485).

VI. CONCLUSIONS OF LAW

The complainant, Raymond Schlagel, asserts that the Department of Labor has jurisdiction over his whistleblower discrimination complaint under several federal environmental statute employee protection provisions. The statutes under which the complainant contends his activities are protected are the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 ("CERCLA"), the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), and the Clean Air Act, 42 U.S.C. §7622 ("CAA"). The implementing regulations are found at 29 C.F.R. Part 24. The Secretary of Labor has held that there is broad jurisdiction under whistleblower provisions of environmental statutes. *See Jenkins v. U.S. EPA*, Case No. 92-CAA-6, (Sec. Dec. and Order, May 18, 1994); *Minard v. Nerco Delamar Co.,* Case No. 92-SWD-1, (Sec. Dec. and Order, Jan. 25, 1994).

In environmental whistleblower cases, the complainant has an initial burden of proof to make a prima facie case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and, (3) the evidence is sufficient to

raise a reasonable inference that the protected activity was the likely reason for the adverse action. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996).

Turning to the first element of the prima facie case, I am guided by secretarial decisions on what action constitutes a protected activity. The Secretary has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the environmental acts. While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. In other words, the standard involves an objective assessment. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997). In the *Minard* case, the Secretary indicated the complainant must have a reasonable belief that the substance is hazardous and regulated under an environmental law. Consequently, the complainant's concern must at least "touch on" the environment. *Nathaniel v Westinghouse Hanford Co.*, 91- SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Finally, an internal environmental complaint is covered under the employee protection provisions of the environmental statutes. *Carson v. Tyler Pipe Co.*, 93-WPC-11 (Sec'y Mar. 24, 1995). According to the Secretary, an internal complaint should be a protected activity because the employee has taken his or her environmental concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987) (order of remand). The report may be made to a supervisor, or through an internal complaint or quality control system, or to an environmental staff member. *Williams v TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993); and, *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993).

The second element involves the determination of an adverse employment action. Actions with respect to an employee's compensation, terms, condition, or privileges of employment are covered under the environmental employee protection provisions and may be considered adverse actions. *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA- 6 (Sec'y May 18, 1994); *DeFord v. Secretary of Labor*, 700 F. 2d 281, 283, 287 (6th Cir. 1983).

To prevail on the third element of the prima facie case, a complainant only needs to establish a reasonable inference that his or her protected activity led to, or caused, the respondent's adverse action. This burden to show an inference of unlawful discrimination is not onerous. *McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec'y Jul. 16, 1993). At this point of the process, the complainant need only present evidence sufficient to prevail until contradicted and overcome by other evidence. *Jackson v. The Comfort Inn, Downtown*, 93-CAA-7 (Sec'y Mar. 16, 1995), citing *Carroll v. Bechtel Power Corp.*, 91-ERA-46 (Sec'y Feb. 15, 1995), slip op. at 11. In that regard, the

Secretary has noted that one factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996). Close temporal proximity may be legally sufficient to establish the causation, or third element, of the prima facie case. *Conway v. Valvoline Instant Oil Change*, Inc., 91- SWD-4 (Sec'y Jan. 5, 1993). Findings of causation based on closeness in time have ranged from two days, (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 7), to about one year (*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17,1993)).

On the other hand, just as temporal proximity may be a factor in showing an inference of causation, the lack of it also is a consideration, especially if a legitimate intervening basis for the adverse action exists. *Evans v. Washington Public Power Supply System*, 95-ERA-52 (ARB Jul. 30, 1996), citing *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995). If a significant period of time elapses between the time the respondent is aware of the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Shusterman v. Ebasco Serv., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992), slip op. at 8-9.

If the complainant presents a prima facie case showing that protected activity motivated the respondent to take an adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. In other words, the respondent must show it would have taken the adverse action even if the complainant had not engaged in the protected activity. *Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989).

If the respondent does present evidence of a legitimate purpose, the final step in the adjudication process is to determine whether the complainant, by a preponderance of the evidence, can establish that the respondent's proffered reason is not the true reason for the adverse action. In this final step, the complainant has the ultimate burden of persuasion as to the existence of retaliatory discrimination. The complainant may meet that burden by showing the unlawful reason more likely motivated the respondent to take the adverse action. Or, the complainant may show the respondent's proffered explanation is not credible. *See Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs.*, Inc., 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 86-ERA- 32 (Sec'y Jun. 28, 1991); and, *Darty v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983).

Initially, I note that my jurisdiction is limited by law in this case to deciding only whether the complainant was discriminated against because he engaged in protected activity under the applicable environmental protection statutes. I am limited to deciding only this issue and cannot consider whether the employer acted properly in making decisions unrelated to the complainant's protected activity. Likewise, I do not have the authority to decide whether the complainant's supervisors acted improperly unless those actions were related to

the protected activity under the applicable statutes. My inquiry must focus solely on whether the complainant's protected activity was the reason for the adverse actions taken by Dow Corning.

A. *Dow Corning as "Employer" Under the Acts*

A necessary element of a valid complaint under the employee protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 ("CERCLA"), the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), and the Clean Air Act, 42 U.S.C. §7622 ("CAA") is that the party charged with discrimination is an employer subject to the Acts. *See, e.g., Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983).

The evidence clearly indicates that Dow Corning is subject to the Acts. Neither party argues applicability of the Acts.

B. *Protected Activity*

This case arises under Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 ("CERCLA"), the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), and the Clean Air Act, 42 U.S.C. §7622 ("CAA"). Section 9610(a) of CERCLA provides that:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. §9610(a). The other environmental statutes applicable to this proceeding contain similar employee protection provisions. *See* 15 U.S.C. § 2622; 42 U.S.C. §7622. Also, the regulations pertaining to employee complaints based on these statutes provide at 29 C.F.R. §24 that:

> (b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:

> (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
>
> (2) Testified or is about to testify in any such proceeding; or
>
> (3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

29 C.F.R. §24.2(b)(1-3).

To constitute protected activity, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). The environmental protection statutes do not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Raising particular, repeated concerns about safety issues that rise to the level of a complaint constitutes protected activity. *Bechtel Construction Co. v. Secy. of Labor*, 50 F.3d 926, 931 (11th Cir.1995). Making general inquiries regarding safety issues, however, does not automatically qualify as protected activity. *Id*. Where the Complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9.

The Secretary of Labor has consistently held that an employee who makes internal safety complaints is protected under the whistleblower provisions of the applicable environmental statutes. *Goldstein v. Ebasco Constructors Inc.*, Case No. 86-ERA-36 (Sec'y Dec. and Order April 7, 1992), *rev'd sub. nom,. Ebasco Contractors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 16, 1993) (per curiam); *Willy v. The Coastal Corporation*, Case No. 85-CAA-1 (Sec'y Dec. and Order June 4, 1987); *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8 (Sec'y Dec. and Order April 29, 1983). Reporting safety and environmental concerns under CERCLA internally to one's employer is protected activity. *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994); *see also Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993)(addressing internal complaints under TSC complaint); *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996)(addressing internal complaints under CERCLA).

If a complainant had a reasonable belief that the Respondent was in violation of an environmental act, that he or she may have other motives for engaging in protected activity is irrelevant. The Secretary concluded that if a complainant is engaged in protected activity which "also furthers an employee[']s own selfish agenda, so be it." *Carter v. Electrical*

District No. 2 of Pinal County, 92-TSC-11 (Sec'y July 26, 1995) (some evidence indicated that Complainant's motives were to retaliate because of a wage dispute with a new manager).

Complainant alleges that he engaged in protected activity when he repeatedly raised concerns regarding: 1) environmentally critical valves running on bypass; 2) the presence of solids in the manufacturing process; 3) the malfunctioning flow meter; 4) freon leaks; 5) unsafe work practices, i.e., the operations manager running into a hydrogen chloride cloud; and 6) design issues with the tantalum pipes resulting in releases. Complainant raised these concerns through face-to-face meetings with supervisors, e-mails, and reports. Each incident involving Complainant's claims to management will be reviewed individually.

1. Complainant speaks to Andy Pierce after July 27, 1997 methylchloride release

Complainant's conversation with Pierce was motivated by the two factors key to the methylchloride release: 1) the presence of solids in the process and 2) bypassed control valves. The chemical release is clearly an environmental issue, and Complainant's inquiries to his supervisor as to implementing solutions to prevent further releases clearly represent protected activity. Pierce's testimony supports my determination that these conversations did take place.

Furthermore, the reasonableness of Complainant's focus on the bypassed valve as a contributing factor to the methylchloride release is substantiated by Mike McGee's e-mail on August 5, 1997, which listed bypassed valves as a "root cause" of the release.

2. Complainant's November 6, 1997 e-mail

In his e-mail, Complainant primarily addresses his fiscal concerns with the efficacy of the C3 Motors Project to Andy Pierce. The e-mail, however, does contain a brief section in which Complainant mentions the bypassed valves. When I consider the e-mail as a whole, I find that the brief section does not constitute protected activity. At most, the section appears to serve as merely an example that the complainant is providing Pierce to demonstrate that he is attuned to safety issues. Furthermore, it is unclear whether the final sentence of that section – "This seems to be a rate/safety issue." – is in reference to the bypassed valve or the C3 Motors Project, which is the subject of the e-mail. The mentioning of the bypassed valve situation, in this context, is not a clear and definite assertion of a safety concern. Rather, the short allusion to the bypassed valve situation appears to exist only as an example. Accordingly, I find that this e-mail is not protected activity.

3. Complainant's October 10, 1997 e-mail to Andy Pierce, Chris Lanthier, and John Lackner

Complainant's e-mail fails to raise any safety or environmental concerns. Rather, the e-mail contains Complainant's proposal for a process change. Furthermore, the e-mail neither

cites a safety or environmental statute nor provides a safety or environmental problem as the motivating feature behind the e-mail. Accordingly, I find that the e-mail is not protected activity.

4. Complainant's December 1997 meeting with John Lackner

Complainant testified that he discussed his concerns over environmental and safety issues such as freon releases, valve bypasses, equipment issues, and compressor problems with John Lackner during a December 1997 meeting. Lackner, however, initially denied any awareness of Complainant's concerns prior to his April 1999 e-mail to Kelly, Dodd, and Ovsenik. (Tr. 525). Upon further questioning, however, Lackner backtracked, stating:

> [Q: You did not have any knowledge about his concerns about bypass valves, his concerns about solids issues?]
>
> A: Ray and I - - Ray initiated one conversation with me in about '96, when he asked to be put in a manufacturing job when I was ops manager. All other discusions with Ray were initiated by me in my management by walking around or later some of the interviews that we had together, where I asked him to come to a meeting.

Id.

I accept Complainant's testimony regarding this conversation with Lackner as truthful and probative. Accordingly, I find this conversation was protected activity as Complainant raised specific environmental and safety concerns. Lackner's testimony on this point is unreliable. His initial denial of any conversations regarding Complainant's environmental and safety concerns is quickly undercut by his admission that Complainant did initiate one conversation with him about those concerns around 1996. Furthermore, Lackner's testimony intimates the presence of other conversations, allegedly initiated by Lackner himself. However, Lackner later reverses course yet again, stating that Complainant *never* raised environmental concerns to him. (Tr. 1017).

I find it entirely possible that the conversation Lackner references as occurring in 1996 is the same conversation that Complainant references as occurring in 1997. Thus, I credit Complainant's testimony on this point, and I find that Schlagel engaged in protected activity.

5. Complainant's June 26, 1998 meeting with John Lackner

During this meeting, Lackner and Complainant discussed a job move for the complainant. While Lackner denies speaking to Complainant about environmental and safety issues, (Tr. 525), the existence of the meeting is incontrovertibly demonstrated by Lackner's

e-mail to Complainant, requesting the meeting. (CX 22, p. 62). Again, I find that this conversation was protected activity. Complainant alleges he spoke of environmental and safety concerns, and Lackner's denial of conversations about such topics is equivocal at best. (Tr. 525). Lackner's response is vague as to whether during the "management-initiated" conversations, safety and environmental concerns were raised or, on the other hand, Complainant never mentioned his concerns when management initiated conversations with him regarding a number of other topics. *Id.* Lackner did assert, definitively, that no environmental concerns were expressed to him during the June meeting. (Tr. 1014). On balance, however, I find that Complainant has demonstrated, by a preponderance of the evidence, the existence of this conversation about environmental and safety concerns. Accordingly, I find that Complainant engaged in protected activity.

6. Complainant files PCR to replace flow meter

The Complainant's PCR request clearly states that it is motivated by a desire to bring the flow meter into compliance with regulatory standards. The Complainant's request to replace the flow meter, therefore, is clearly protected activity. It makes no difference, as Mike Nevin attempted to assert, who in the plant brought the problem to the attention of management. Furthermore, it is irrelevant that the request could have been more timely. A request by an employee to management to bring a process into regulatory guidelines is the epitome of protected activity.

7. Complainant's August 28, 1998 meeting with Lackner

Complainant's notes, made after the meeting, indicate that safety and environmental issues were discussed. (CX 26, p. 66). Lackner, however, testified that no environmental issues were raised, stating:

> [Q: During this conversation in late August, did Mr. Schlagel raise any environmental concerns or issues with you?]
>
> A: No. His concerns seemed to be focused on his work load and his need to stay and his need to complete the projects he was working on.

(Tr. 1015-16).

The occurrence of the conversation is attested to by both parties, leaving the sole issue as to whether protected activity occurred as the substance of the conversation. For two reasons, I adopt Complainant's version of the conversation. First, Complainant's contemporaneous notes of the meeting reveal that environmental and safety concerns were discussed. Secondly, Lackner's testimony, when viewed as a whole, equivocates on the substance of the conversations. Accordingly, I find that the record reveals, by a preponderance of the

evidence, that environmental and safety concerns were discussed, and protected activity was engaged in during the August 28, 1998 meeting between Lackner and Complainant.

8. Complainant's August 31, 1998 meeting with Mike Nevin

Complainant asserts that he spoke to Nevin concerning the compressor project and equipment use issues during this conversation. Complainant's contemporaneous notes of the meeting include a comment that "concerns with Area II" were mentioned. (CX 29, p. 69). Nevin, however, denies such topics ever arose, stating that Complainant merely mentioned the projects he was working on at the time.

Upon review of the evidence of this conversation, I find that Complainant has demonstrated protected activity. With this conversation, I am faced with three pieces of evidence: Complainant's version, Nevin's version, and Complainant's contemporaneous notes of the meeting. The weight of the evidence yields that environmental and safety concerns were discussed. Accordingly, I find that Complainant engaged in protected activity when he expressed his concerns over safety and environmental issues to Nevin.

9. Complainant's August 31, 1998 e-mail to Chris Kneale and other Area II employees

The complainant's e-mail clearly states that the refrigeration units must be properly filled, despite apprehensions that the addition of freon would result in a reportable release. Again, a request by an employee to bring a process into regulatory guidelines is the epitome of protected activity. I find that Complainant's e-mail was protected activity.

10. Complainant's September 29, 1998 e-mail concerning upcoming FES visit

The complainant's e-mail solely related to tasks to be performed before the FES visit. The e-mail, while dealing with areas about which the complainant had concerns, expresses no specific and definite safety or environmental concerns. It is devoid of an expression of any concern, other than an attempt to outline the activities and projects to be completed before the FES visit. As it contains no expression of a safety or environmental concern, I find that the e-mail is not protected activity.

Furthermore, the e-mail is a summary of a meeting between five people. While Complainant wrote the e-mail, the e-mail indicates that it is a summary of the contributions of all of the members of the meeting, not simply Complainant. For that additional reason, I find that the e-mail is not protected activity.

11. Complainant's January 7, 1999 performance review of Chris Kneale for John Lackner

While the performance review alludes to previous conversations between Complainant and Lackner, it does not specifically and definitely raise them again. Indeed, the thrust of the e-mail is the review of the complainant's supervisor, Chris Kneale. I find that the e-mail is not protected activity.

12. Complainant's February 25, 1999 e-mail to Chris Kneale concerning heat exchangers

Complainant's e-mail concerning the performance of the heat exchangers is protected activity. Again, a request by an employee to bring a process into regulatory guidelines is protected activity.

13. Complainant's April 23, 1999 e-mail to Dodds, Ovsenik, and Kelly

The Complainant's e-mail to Dodds, Ovsenik, and Kelly is clearly protected activity. The note canvasses the gamut of Complainant's environmental and safety concerns. The Respondent's own actions – launching an investigation into the environmental and safety concerns raised by the e-mail – is testament to the clarity with which the e-mail expressed Complainant's safety and environmental concerns. Ovsenik testified:

> Q: Following receipt of this document [Complainant's April 23, 1999 e-mail], what action, if any did you take?
> A: I talked to my supervisor, Jeanne Dodd who is also cc'd on the memo and discussed with her just in general terms, she had already seen it and read it, and we discussed the issues raised, knew we needed to talk to Mr. Kelly to let him know that we had looked at it and offered some advice to him and we planned that I would handle the environmental health and safety aspects that were raised in the memo...
> ....
>
> Q: Okay. Now you said that you were going to take the EH&S side of this. What did you undertake to do?
> A: Well, I went through the memo carefully to try to filter out what really was environmental health and safety issues raised and flagged those....and I contacted Mike [Nevin] and said, you know, we need to review this and I need some assistance from you to clarify some of these positions.

(Tr. 737). Ovsenik went on to say that employees raised issues that might fall within the environmental health and safety field "[o]n almost a daily basis." (Tr. 738).

I find that the complainant's April 23, 1999 e-mail to Dodds, Ovsenik, and Kelly represented protected activity.

14. Complainant's October 15, 1999 e-mail to Dow Corning CEO Gary Anderson

For the reasons discussed above, I find that Complainant's October 15, 1999 e-mail to Dow Corning CEO Gary Anderson, with the April 23, 1999 e-mail attached, is protected activity. The clear import of the e-mail is to direct Mr. Anderson's attention to the safety and environmental concerns that Complainant raised and the effects of making such concerns known.

15. Complainant's October 15, 1999 "All Carrollton" e-mail

The Complainant's e-mail to everyone at the plant is not protected activity. The import of the e-mail was not to warn employees of safety or environmental hazards. Rather, by the Complainant's own admission in the e-mail, its delivery was meant to squelch rumors. Additionally, the e-mail attacks the professionalism of Chris Lanthier and the propriety of moving Complainant from one position to another. It is devoid of any expression concerning safety or environmental concerns. Mere attachment of the previous e-mails does not suffice to bring this communication within the reach of protected activity.

Disclosure of safety concerns to co-workers does not take a complainant's activity out of the scope of protected activity. Indeed, the environmental protection statutes specifically protect an employee's right to communicate safety concerns to co-workers. *See Harrison v. Stone & Webster Engineering Group*, 93-ERA-44 (Sec'y Aug. 22, 1995). Protected activity has been found when an employee takes the opportunity to publicize his concerns in a broad forum, such as a company picnic. *See Immanuel v. Wyoming Concrete Industries, Inc.*, 95-WPC-3 (ALJ Oct. 24, 1995). In *Immanuel*, the administrative law judge recommended a finding that the Complainant's distribution of a leaflet at a company picnic that raised environmental concerns grounded in conditions reasonably perceived as violations of the FWPCA was protected activity. The administrative law judge found that the remedial purpose of the statute would not be served if an employer was permitted to retaliate merely because management learned of the employee's disclosure indirectly through another employee. The instant case, however, can be distinguished from *Immanuel*. The Complainant's All-Carrollton e-mail does not address all Carrollton plant employees for the purpose of expressing environmental and safety concerns. Rather, as stated above, the e-mail on its face serves only two purposes: 1) to respond to what Complainant believes will be inevitable rumors about the situation; and 2) to question the leadership of Chris Lanthier. Neither of these purposes expresses a safety or environmental concern, and I find that *Immanuel* is unavailing to Complainant. Accordingly, I find that Complainant's e-mail to the entire plant is not protected activity.

C. *Adverse Employment Action*

To constitute an adverse action, Complainant must demonstrate by a preponderance of the evidence that the action had some adverse impact on his employment. *See Trimmer*, 174 F.3d at 1103 (citing *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)); *but see DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983))(economic loss is not required for action to be adverse). The governing regulations define discrimination or an adverse employment action very broadly. *See* 29 C.F.R. 24.2(b)("Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, *or in any other manner discriminates against any employee* because the employee has [engaged in protected activity]") (emphasis supplied). Activities found to be adverse employment actions include, but are not limited to, elimination of position, threats of termination, blacklisting, causing embarrassment and humiliation, constructive discharge, and issuance of disciplinary letters.

Complainant alleges that the respondent discriminated against him because of his protected activity by 1) removing him from the compressor project; 2) removing him from the methylchloride area; 3) attempting on three occasions to remove him from Area II in January, June, and August 1998; 4) unjustly criticizing him in his April 1999 performance appraisal; 5) "demoting" him to a backstep position he did not desire; 6) suspending him in October 1999; and 7) terminating his employment on November 10, 1999. (Complainant's Trial Brief, p. 22-23). Each alleged adverse action will be reviewed individually.

As an initial matter, Respondent contends that Complainant's "poor" performance evaluations and any attempts or threats to move Complainant out of Area II or the methylchloride process cannot constitute adverse action because they occurred outside of the applicable thirty (30) day period in which the environmental protection statutes allow for such claims. (Respondent's Post Hearing Brief, p. 37). It is true that claims alleging illegal conduct that occurred more than 30 days prior to the filing of a complaint are time-barred unless either (a) equitable tolling is appropriate or (b) the Respondent's actions constitute a continuing pattern of retaliatory conduct that is apparent only with the passage of time. *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001). Complainant neither asserts that equitable tolling is appropriate nor that Respondent's actions constitute a continuing pattern of retaliatory conduct. (Complainant's Reply Brief, p. 12). Rather, Complainant argues that such acts are evidentiarily relevant. *Id.* (citing *Melendez v. Exxon Chemicals Americas*, 1993-ERA-6 (ARB July 14, 2000), p. 8).

For two reasons, I find the events are evidentiarily relevant although neither can constitute adverse employment actions upon which Complainant's claim for relief is based. First, previous performance shortcomings of Complainant, as announced and explored in Complainant's annual performance reviews, that were cited by Respondent's decision-makers as contributing to the decision to move and eventually terminate Complainant are an integral part of the termination decision and must be evaluated accordingly. Second, previous

incidents cited by Complainant as evidence of retaliatory intent that were not cited by the decision-makers as contributing to the termination decision must be evaluated in examining the mind-set of the decision-makers in reaching the termination decision. Accordingly, I will review the Complainant's performance evaluations and any attempts to remove Complainant from Area II or the methylchloride process as relevant contextual evidence in which to view the events falling within the statutorily permitted time frame. *See id; see also Odom v. Anchor Lithkemko/Int'l Paper,* ARB Case No. 96-189, Oct. 10, 1997, slip op. at 6 n.6. In *Odom*, the Board examined personnel actions preceding the complainant's termination to determine whether those actions provided evidence of retaliatory animus "even though they were discrete incidents that occurred outside the limitations period, since they formed a basis in part for Odom's termination and 'shed light on the true character of matters occurring within the limitations period.'" *Odom*, slip op. at 6 n.6 (citing *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1140-41 (6th Cir. 1994)).

1. Complainant's removal from the compressor project

It is undisputed that Complainant was removed from the compressor project on November 12, 1997. Complainant was not reassigned to another position. Rather, his authority and responsibility over a specific aspect of the compressor project was removed. (CX 107, p. 194). The complainant's removal was not a random reorganization of tasks by management; it was motivated by Complainant's past and present project performance. (Tr. 1018-19). When his subsequent projects involved compressors, he was, after his removal, forced to seek the approval of the "hit team." *Id.* I find this demotion in responsibility and authority to be an adverse employment action.

In *Graf v. Wackenhut Services, L.L.C.*, 1998-ERA-37 (ALJ Dec. 16, 1999), the administrative law judge found that "[t]he Tenth Circuit liberally defines the phrase 'adverse employment action' and 'takes a case-by-case approach to determining whether a given employment action is adverse.'" *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998) (employment action is not required to be materially detrimental). The judge wrote:

> In *Jeffries*, for example, verbal interrogation and reprimand were sufficient to constitute adverse employment actions even though said actions did not actually have an adverse impact on the terms and conditions of the employee's employment. *Id.* Other examples of adverse actions include "decisions that have demonstrable adverse impact on future employment opportunities or performances, demotions, [] unjustified evaluations or reports, transfer or reassignment of duties, [and] failure to promote." *Fortner v. Kansas*, 934 F. Supp. 1252, 1266-67 (internal citations omitted), aff'd sub nom. *Fortner v. Rueger*, 122 F.3d 40 (10th Cir. 1997). Nevertheless, it is not sufficient for a complainant to simply testify that he did not like the action or wished that the action had not occurred. *Trimmer*, 174 F.3d at 1103 (citing *Greaser v. Missouri Dep't of Corrections*, 145 F.3d 979, 984 (8th Cir. 1998). *See also*

> *Fortner*, 934 F. Supp. at 1266-67 "[N]ot everything that makes an employee unhappy is an actionable adverse action."). Speculative harm will not constitute adverse employment action. *Id.*

Id. The *Graf* rationale is instructive, though not controlling in the instant case. As Complainant's removal was motivated by specific concerns over his performance and, more importantly, caused a demonstrable decrease in his authority and control, I find that his removal from the compressor project constituted an adverse employment action. Adverse action has been identified in previous cases with much less substantive effect present in the transfer, such as finding adverse action based on work preference). *See McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec'y July 16, 1993)(holding transfer to a new position constituted adverse action in that it prevented Complainant from performing supervisory duties and field enforcement work, which he preferred). *See also Delaney v. Massachusetts Correctional Industries*, 90-TSC-2 (Sec'y Mar. 17, 1995)(holding that an involuntary transfer, even to a job with the same pay and benefits, would constitute an adverse action as the new job carried different, albeit similar, responsibilities and, therefore, adversely affected Mr. Delaney's "terms, conditions [and] privileges of employment).

2. Complainant's removal from the methylchloride process

When Katy Biallas entered Area II as a project engineer, Complainant was removed from his methylchloride responsibilities but retained his hydrolysis responsibilities. Complainant asserts that this transfer evidences retaliation because job responsibilities were removed from the Complainant after he raised environmental compliance concerns. (Complainant's Trial Brief, p. 30, citing *Berkman v. U.S. Coast Guard*, ARB Case 98-056, ALJ Case 97-CAA-2, 97-CAA-9 (February 29, 2000), p. 18-19). Dow Corning asserts that it was not required to obtain permission from Complainant before moving him and that Ms. Biallas was moved into the area for legitimate reasons. (Respondent's Reply Brief, p. 3). While Respondent is correct that it need not obtain permission from its employees before making a position change, and while it may be true that legitimate reasons existed to transfer Ms. Biallas into the area, the issue at this stage of the analysis is not the justification for the action. Rather, the narrow issue is whether the removal of authority over the methylchloride area from Complainant was an adverse employment action. I find that such removal was an adverse employment action.

The case law thoroughly affirms that whistleblower provisions prohibit discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment, including transfer to a less desirable position, *even though no loss of salary may be involved*. *See, e.g., Martin v. The Department of the Army*, 93-SDW-1 (Sec'y July 13, 1995); *Delaney v. Massachusetts Correctional Industries*, 90-TSC-2 (Sec'y Mar. 17, 1995); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991); *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 13-14 and n.13. The record undeniably reveals that Complainant was involuntarily removed from his responsibilities over the methylchloride

process, while retaining his authority over the hydrolysis process. Regardless of the justification for the removal of Complainant's authority, Complainant nevertheless possessed a job with substantially less responsibility and authority after the Biallas transfer. This produced a clearly less desirable job for Complainant, and I find that the removal of his methylchloride process authority constituted an adverse employment action.

Respondent confuses the doctrine of adverse action when it protests such a finding based on what it deems an absence of nefarious conduct on its part in the removal of authority from Complainant. Respondent's "motive" for such action is more appropriately reserved for review under the "nexus" analysis. The instant analysis is solely concerned with the action and the effect on the complainant. "Discriminatory" and "adverse" have different meanings. *See Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997). In that vein, the involuntary removal of authority was obviously an adverse employment action.

3. Management's attempt to remove Complainant from Area II in January, June, and August 1998

Respondent offered Complainant the opportunity to accept positions in the reliability group on three separate occasions in 1998. Each time, Complainant felt as though he was being forced out of his current position. However, Complainant was not forced to move to the reliability group, as the offer was ultimately rescinded. The mere offering of an employee a job does not represent adverse action. Nothing ever came of the offers.

Complainant does not allege that the offers were parts of a hostile work environment situation. Accordingly, I find that such attempts do not constitute adverse employment action.

4. Complainant's poor performance appraisal in April 1999

Complainant asserts that his poor performance appraisal was an adverse employment action. I find, however, that the performance evaluation did not constitute adverse action. While the "Facilitative Skills" section did note an area of performance that needed improvement, the overall evaluation is not negative. Indeed, the majority of the review is comprised of positive comments concerning the complainant's job performance. The section that Complainant asserts represents adverse action is nothing more than something standard on all comprehensive employee reviews: identification of areas of possible improvement. If Complainant's performance review represented adverse employment action, many employees in the United States receiving comprehensive annual evaluations suffer adverse employment actions. The employee protection statutes cannot and do not comprehend such a result. *See Fortner*, 934 F. Supp. at 1266-67 "[N]ot everything that makes an employee unhappy is an actionable adverse action."). Furthermore, a negative performance evaluation, absent tangible

job consequences, is not an adverse action. *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001).

5. Complainant's "demotion" to the Backstep position

The Complainant was transferred to the Backstep position on October 15, 1999. Complainant claims that the transfer was a demotion and should be considered an adverse action. Respondent maintains that Complainant's move to the Backstep position was, at minimum, a lateral transfer and, more importantly, a "chance to shine."

Demotions are adverse actions. *Fortner v. Kansas*, 934 F. Supp. 1252, 1266-67 (internal citations omitted), *aff'd sub nom*. *Fortner v. Rueger*, 122 F.3d 40 (10th Cir. 1997). Whether Complainant's transfer to the Backstep position was a demotion and/or an adverse action is a fact intensive question. Previously, the following criteria have been adopted as indicia of a demotion: 1) the new job was far less attractive and prestigious; 2) the new tasks were below the employees proven capabilities; 3) the employee no longer had supervisory responsibilities; 4) the new work included certain clerical functions; 5) the quality of the employee's personal work space was materially less; and 6) the employee no longer produced reports to which he signed off. *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983).

Complainant viewed the Backstep transfer as a demotion for four primary reasons. Each will be discussed individually.

First, Complainant expressed uncertainty at the parameters of the job. He testified that the details of the job were not provided to him; however, the only parameters of the job that the complainant could provide as examples of the lack of definition in the position were 1) the lack of a definite supervisor and 2) the absence of a defined extent to the job. I find both of these reasons unpersuasive. First, the choice of supervisor has no material effect on the merits of the job. Secondly, the Backstep position itself was created to explore and define the parameters of the project. The very essence of the job was to define itself by evaluating the needs of the company and adjusting the scope of the job accordingly. Of necessity, the job required a level of non-definition. Complainant's claim that the job was unattractive because it lacked definition is non sequitur.

Second, Complainant claimed that it was unclear whether the job was part-time or full-time. Complainant's notes during his meeting with Chris Kneale, however, indicate that Complainant may have had a sense that the position was part-time until June 2000 and full-time for the remainder of the job. The issue of the job's status as full-time or part-time is ultimately irrelevant. If the position had permanently been part-time, the record is devoid of any indication that Respondent would have refused further work to the complainant. Indeed, Michael Long, the employee who ultimately accepted the position, worked other projects beyond the Backstep position. I find unpersuasive Complainant's argument that the position's

full-time/part-time status rendered it per se an adverse employment action. As there was no indication in the record that Respondent intended for the position to be part-time and Complainant's only employment at Dow Corning, I find that this unsettled issue alone does not make the position transfer an adverse employment action.

Third, Complainant claims that it was uncertain if Backstep would be enacted. This possibility does not make the job offer of the Backstep position an adverse employment action. If Complainant would have accepted the position and the position had never materialized, he simply would have been transferred to another position or returned to his previous job. To claim an adverse employment action, under that scenario, Complainant would then need to address the merits of the position in which he was eventually placed. The possibility that Backstep would not happen, which Complainant surmised from one phrase in one e-mail on one date, (CX 57, p. 104), does not make Respondent's offering of the position to him an adverse employment action. If it did, any foresight by a corporation to prepare for the necessities of an indecipherable future by probing an employee's interest in an as-yet-to-be-determined position would be adverse employment action. I find such reasoning unpersuasive.

Finally, Complainant claims that the project was beneath his skill level, specifically citing the relatively small money directed toward the project. I find this rationale unpersuasive for several reasons. First, it should be noted that Complainant's argument that the job is beneath him contradicts his earlier argument that the details of the position were so sketchy as to render the offer of the employment one made in bad faith. The Complainant cannot assert that the job was only vaguely presented to him, and, then, turn around and argue that the merits of the job are beneath him. It is one or the other; the complainant cannot have it both ways. Accordingly, the veracity of Complainant's argument is weakened. More importantly, however, the financial resources dedicated to a position's disposal do not necessarily indicate the value of the job. While it can be a factor, when I consider the entire record of testimony concerning the position, I find it is not indicative of a menial position. Indeed, the testimony indicates that no one at the plant was entirely certain of the scope of the project as the amount of production loss that would be necessitated from the Wales plant start-up was a guess at best. While it appears that the Backstep position ultimately turned out to be a position that entailed less than expected, it also appears just as likely that the project could have been a major position as the Carrollton plant undertook a major overhaul of their production rates. Furthermore, it is entirely possible that the position involved less money due to the nature of the position, which was shutting down and mothballing equipment. While this Court does not possess substantial knowledge concerning the financial requirements of partially ending production at a plant such as at Carrollton, it is reasonable to assume that it costs less to turn something off than to turn something on or to keep it running. In addition, the draft job responsibilities of the position appear – prepared at a July 1999 meeting in which Complainant participated – substantial and complicated. (CX 196, p. 517). For these reasons, I find unpersuasive Complainant's argument that the position, as indicated by its financial resources, was beneath him.

Upon further consideration of Complainant's arguments addressing the merit, or lack thereof, in the Backstep position, I find that the Respondent's offer and transfer of the Complainant into the position was not adverse employment action. *See Fortner*, 934 F. Supp. at 1266-67 "[N]ot everything that makes an employee unhappy is an actionable adverse action....Speculative harm will not constitute adverse employment action.").

6. Complainant's October 1999 suspension and November 1999 termination

As stipulated by both parties, Complainant's suspension and termination are per se adverse actions.

D. *Nexus Between Protected Activity and Adverse Employment Action*

Once the complainant has demonstrated that 1) he engaged in protected activity and 2) suffered adverse employment action, he must establish a nexus between the protected activity and the adverse employment action. *See Bartlik v. United States Dep't of Labor*, 73 F.3d 100 (6th Cir. 1996). I have identified four adverse employment actions in the instant case: 1) Complainant's removal from the compressor project on November 12, 1997; 2) Complainant's removal from the methylchloride process on August 13, 1998; 3) Complainant's suspension on October 15, 1999; and 4) Complainant's termination on November 10, 1999. Only the latter two, however, can satisfy the complainant's prima facie case. While the Complainant's removal from the compressor project and methylchloride process are evidence that sheds light on the true character of the matters occurring within the limitations period, they are not actionable and cannot be used as evidence to satisfy the complainant's prima facie case. *See Dian-Robainas v. Florida Power & Light*, 92-ERA-10 (Sec'y Jan. 19, 1996), p. 11-12 (quoting *Simmons v. Arizona Public Serv. Co.*, Case No. 93-ERA-5, Sec. Dec., May 9, 1995, slip op. at 9); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133,1141 (6th Cir. 1994); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989). Thus, the question engaged by the final element of the complainant's prima facie case is whether the evidence of record demonstrates a nexus between the complainant's protected activity and Complainant's subsequent suspension and termination.

The sole rationale cited by the complainant as demonstrative of a nexus between his protected activity and the adverse employment actions he suffered is timing. (Complainant's Trial Brief, p. 23-25, citing *Pope v. Anchor Drilling Fluids USA*, 94-TSC-12 (ALJ May 2, 1995), p. 21-22).[4]

[4] While Complainant's Reply Brief refutes Respondent's assertion that no nexus is present because Respondent treated Complainant well after his protected activity, Complainant's Reply Brief suggests no other nexus between his protected activity and the adverse employment actions he was subjected to other than time. (Complainant's Reply Brief, p. 13-14).

I am mindful that the burden on the complainant to demonstrate a nexus between the protected activity and the adverse employment action in his prima facie case is not an onerous one, and I find Complainant's argument persuasive. Complainant engaged in three acts of protected activity in 1999: 1) the February 25, 1999 e-mail concerning the heat exchangers; 2) the April 23, 1999 e-mail to Kelly, Dodds, and Ovsenik; and 3) the e-mail to Dow Corning CEO Gary Anderson. Other protected activity engaged in before 1999 is, at minimum, fourteen months prior to the adverse action in issue, and I find any timeliness nexus argument inapposite. I will, however, discuss the three events occurring within the year prior to Complainant's suspension and termination.

There is no evidence that Complainant's e-mail concerning the heat exchangers bore any relationship to subsequent adverse action. The problem was eventually solved, and it appears that the resolution of the issue of the heat exchangers ended any further discussion or concern. I find that there exists no nexus between this protected activity and any adverse action suffered by the complainant.

Complainant also presents no evidence that his October 15, 1999 e-mail to Dow Corning's CEO resulted in his suspension or termination. Beyond testifying to the fact that he sent an e-mail to Gary Anderson, the complainant's testimony, motions, and briefs are completely devoid of any inference, intimation, or implication that his e-mail to Gary Anderson played any role in his suspension or termination. Not once during the discovery or hearing of the instant case does Complainant raise the possibility that his suspension or termination was ordered via an edict from Dow Corning's CEO once he received Complainant's e-mail. While establishing a nexus between protected activity and adverse action in the complainant's case is not an onerous one, the inference alleged by the complainant must be a reasonable one. *McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec'y Jul. 16, 1993). Complainant has made no attempt to assert this inference, and I find that Complainant has not established a nexus between his e-mail to Gary Anderson and his subsequent suspension and termination.

I do find, however, Complainant's timeliness argument persuasive in regards to his April 23, 1999 e-mail. Admittedly, Complainant's April 23, 1999 e-mail to Kelly, Dodds, and Ovsenik generated a significant response. Complainant's suspension and termination occurred six months after the delivery of the e-mail. Respondent's efforts to move Complainant into a position he clearly did not desire began shortly after the delivery of his e-mail.

If Respondent's investigation into Complainant's safety and environmental concerns as stated in his April 23, 1999 e-mail had been thorough and adequate, Complainant's temporal proximity argument would lose considerable weight. I find, however, the respondent's investigation into Complainant's concerns suffers from serious problems. Ed Ovsenik's testimony concerning the respondent's investigation demonstrated that the investigation was poorly conducted. First, no documentation was obtained from employees within the areas that Complainant raised concerns to verify or discount Complainant's complaints. Instead,

the "investigation" seems to have been comprised of a few phone calls and one day of meetings with very few people. Indeed, Ovsenik testified that no documentation was ever received from the various people he spoke with. It appears that Ovsenik relied on oral representations by Mike Nevin, John Lackner, and Chris Kneale. Secondly, Ovsenik either failed to take notes when speaking to people about the environmental concerns or misrepresented talking to such people. Respondent's corporate attorney's failure to remember the names of individuals to whom he spoke when investigating serious safety and environmental allegations bespeaks poorly of the effort made by the corporation to uncover the truth behind Complainant's environmental and safety concerns. Furthermore, Ovsenik shredded the notes he did take *before* a final report was produced. Shredding one's notes before producing a final report boggles the conscience. These factors combined to produce a picture where Complainant's temporal proximity argument carries probative weight at this stage in the analysis. These facts lead to a reasonable inference that the investigation was not conducted seriously and that other responses – possibly discriminatory responses – were made by the respondent toward the complainant.

I find that the temporal proximity between Complainant's April 23, 1999 e-mail and the processes ultimately concluding with his suspension and termination raises a reasonable inference. Thus, Complainant has demonstrated a prima facie case.

E. *Respondent's Burden of Production and Complainant's Burden to Demonstrate Pretext*

If the complainant presents a prima facie case showing that protected activity motivated the respondent to take an adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. In other words, the respondent must show it would have taken the adverse action even if the complainant had not engaged in the protected activity. *Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989). In the instant case, I find that Respondent has amply demonstrated that the adverse actions levied against the complainant were motivated by legitimate, nondiscriminatory reasons. I shall discuss Respondent's claims to both Complainant's suspension and termination, in addition to addressing Respondent's motives for moving Complainant to the Backstep position.

If the respondent does present evidence of a legitimate purpose, the final step in the adjudication process is to determine whether the complainant, by the preponderance of the evidence, can establish that the respondent's proffered reason is not the true reason for the adverse action. In this final step, the complainant has the ultimate burden of persuasion as to the existence of retaliatory discrimination. The complainant may meet that burden by showing the unlawful reason more likely motivated the respondent to take the adverse action. Or, the complainant may show the respondent's proffered explanation is not credible. *See Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs.*, Inc., 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 86-ERA- 32

(Sec'y Jun. 28, 1991); and, *Darty v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983). In this section, I shall also discuss Complainant's efforts to demonstrate the disingenuousness of Respondent's proffered reasons.

1. Respondent transfers Complainant to the Backstep position[5]

First, the record is devoid of evidence that demonstrates that Respondent's transfer of Complainant to the Backstep position was motivated by any concerns other than company need and employee fit.

Complainant's conversations, phone calls, letters, and e-mails regarding safety concerns did not provide the impetus for such a move. Complainant was encouraged to send his April 23, 1999 e-mail by Nathan Franklin, a Dow Corning attorney. There exists absolutely no evidence that Mr. Franklin's encouragement was a false pretense to lure Complainant to send an e-mail that would serve as his demise. When Franklin made such a recommendation, he could not have had an idea as to the extent or the depth of Complainant's concerns. The record contains no evidence that would cause me to doubt the sincerity of Mr. Franklin's referral. During his testimony, Complainant never questioned Mr. Franklin's motives for his referral. Furthermore, the record is replete with testimony and documentation demonstrating Dow Corning's receptiveness to safety and environmental concerns. While it is not surprising that an employer charged with violating safety and environmental regulations and statutes would offer proof demonstrating its amenability towards environmental and safety compliance, the record in the instant case demonstrates that Complainant's supervisors, at many times, gave him free reign to research his concerns at their expense. Complainant offers not one piece of probative evidence demonstrating that he was ever stopped from communicating a concern.

Second, it is abundantly clear that the discussions of the Backstep position involved several candidates. The position was not created solely to move Complainant out of his current area. Indeed, the move of Complainant was to create a better fit with Complainant's skills. The record demonstrates that, even before Complainant's April 1999 e-mail, his supervisors had expressed concern over the congruence between his skills and his current job responsibilities. Furthermore, any argument that Respondent was engaging in hit-and-run tactics, i.e., moving Complainant at the first sign of safety or environmental concerns to benign jobs, is unsupported by the record. The Backstep position had the responsibility to safely and in an environmentally-conscientious way stop certain plant processes, store them, and prepare them for reuse. The Backstep position was not a clerical position away from the machinery and processes of the plant that would rob Complainant of any opportunity to observe the environmental and safety steps taken by the plant. Again, assuming *arguendo*,

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[5] Although I have specifically found that such a transfer was not an adverse employment action, I address the respondent's claims for such a transfer to place my subsequent analysis of the respondent's suspension and termination decisions in a better context.

that the transfer of Complainant to the Backstep position was adverse employment action, the record is replete with evidence that demonstrates a legitimate intervening basis for the transfer: 1) the congruence, or lack thereof, of Complainant's skills and his job responsibilities, and, more importantly, 2) the well-established need of the plant to slow production.

I find that the record also establishes that the Backstep program was going to eliminate one of the two project engineers in Area II. Either Katy Biallas or Raymond Schlagel would lose a position in that area. Respondent has sufficiently demonstrated that Schlagel was chosen for the position because it was his time to move out of the area, whereas Biallas was a recent addition to Area II and had not yet gained a familiarity with all of the processes in that area. I find unpersuasive Complainant's attempts to argue that Biallas was a more fitting choice for the Back step position, as the evidence provides no support for such an assertion beyond Complainant's mere wishes.

2. Complainant's Suspension

I find that Respondent has demonstrated legitimate, nondiscriminatory reasons for Complainant's suspension in October 1999.

First, the complainant's e-mail is clear insubordination. The e-mail demonstrates an unequivocal intent to present matters occurring between Complainant and management to a wider audience so that management may be embarrassed. Furthermore, Complainant openly questions the leadership of Chris Lanthier, which further defies management's authority and leadership ability. Complainant's admission in the e-mail that he may be fired for such an e-mail is demonstrable proof that Complainant realized his e-mail was not serving as a safety or environmental warning to the entire plant but rather acting as a last-ditch effort to embarrass and humiliate the management of the plant.

Second, Respondent also produces evidence that Complainant's suspension was motivated by breach of confidentiality. I find this reason plausible and credible. Respondent has demonstrated that the e-mail was delivered to outside contractors on the plant site and contained production information inappropriate for such dissemination. (Tr. 515-23).

Respondent also advances that Complainant's e-mail caused plant-wide disruption. It is clear that Complainant's e-mail caused some employees to discuss the matter, taking time away from the job responsibilities. A few employees may have been concerned about Complainant's state of mind because the e-mail was so out-of-the-ordinary, but I do not agree that a plant-wide state of panic occurred. Witnesses at the plant are uniform in their inability to cite any form of disruption amongst the majority of plant workers beyond mere discussion of the e-mail. While I find that any physical "disruption" to the plant was relatively minimal, the plant-wide mailing of the e-mail was disruptive in the sense that an inappropriate forum was utilized to express an individual concern. While the evidence clearly reveals that the e-mail caused Mr. Lackner a substantial disruption, as he found it necessary to canvass

the plant to assure workers of safety, I find Respondent's assertions of plant-wide disruption exaggerated.

While I credit Complainant's questioning of the actual quality of any plant-wide disturbance created by his e-mail, Complainant advances no other meritorious arguments that would call into question the validity of Respondent's accusations of insubordination and breach of confidentiality. Furthermore, beyond Complainant's temporal proximity argument used to present his prima facie case, I find that Complainant has failed to present further, compelling linkages between his protected activity and the adverse employment actions befalling him that would call into question the reasons advanced by the respondent for his suspension.

On balance, I find the record clearly reveals substantial, legitimate, nondiscriminatory reasons behind the suspension of the claimant in October 1999.

3. Complainant's Termination

I find that Respondent has also demonstrated legitimate, nondiscriminatory reasons for Complainant's termination. Beyond the reasons for Complainant's suspension, which I have already discussed and which also led to his eventual termination, Respondent advances that a review of Complainant's entire employment record facilitated Respondent's ultimate decision to terminate Mr. Schlagel's employment. I find this reason persuasive.

The record demonstrates that Complainant's supervisors expressed dissatisfaction with particular areas of his job performance -- well before any protected activity on the complainant's behalf. Complainant's shortcomings remained constant during his employment at Dow Corning. Complainant's evaluations consistently demonstrate an inability to facilitate communication between team members and an inability to implement the processes necessary to take projects from paper and ideas to actual work product. Complainant's interactions with other employees also evidence his inability to effectively communicate, such as his mute response to Mike Nevin's job offer.

Complainant has brought forth no compelling argument or evidence which would cause this Court to question the validity of the reasons proffered by the respondent for Complainant's termination.

On balance, I find the record clearly reveals legitimate, nondiscriminatory reasons behind the termination of the complainant in November 1999.

VII. CONCLUSION

The record demonstrates that Complainant engaged in protected activity and suffered adverse employment action. Ultimately, however, no nexus between the complainant's protected activity and the adverse employment action has been demonstrated. Accordingly, Complainant has failed to demonstrate his entitlement to relief under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 ("CERCLA"), the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), or the Clean Air Act, 42 U.S.C. §7622 ("CAA").

RECOMMENDED ORDER

Mr. Schlagel's claim of discrimination under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 ("CERCLA"), the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), and the Clean Air Act, 42 U.S.C. §7622 ("CAA") is DISMISSED.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE OF REVIEW: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of the Recommended Decision and Order, and shall be served on all parties and on the Chief, Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).